IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., *et al.*,
Petitioners,

v.

OLIVIA NIEMI,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

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BRIEF AMICUS CURIAE ON BEHALF OF CBS INC. IN SUPPORT OF PETITION FOR CERTIORARI

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Amicus CBS Inc. adopts petitioners' statements of Opinions Below, Jurisdiction, Question Presented and Constitutional Provisions Involved.

INTEREST OF AMICUS

CBS Inc. is the owner of radio and television broadcasting stations and the operator of radio and television broadcasting networks. Amicus participated in the pro-

ceedings below by filing briefs in both the state court of appeal and supreme court. Its interest in free speech and expression, as a journalistic enterprise and as a broadcaster of entertainment, cultural and public affairs programs, will be severely affected if the decision of the court below is not reversed.

STATEMENT OF THE CASE

In "Born Innocent," a dramatic two-hour motion picture broadcast by the NBC Television Network in September 1974 the plight of an adolescent girl in a women's reformatory was portrayed. The movie focused on the harmful effects of the state-run home, showing how the girl's personality was progressively hardened by her parents, the institution and its inmates. Although complaints were received by NBC from some viewers and affiliates suggesting that the merit of the picture was a subject about which reasonable people might differ, according to one reviewer, "the suspicion lingers that the very seriousness of 'Born Innocent' is what got it into trouble." N.Y. Times, September 29, 1974, at 21. The same reviewer concluded that "[a]lthough the script was flawed . . . , the thrust of the film was a serious and carefully researched examination of a very real social phenomenon. When it worked, 'Born Innocent' was powerful, provocative and terribly disturbing." *Id.*[1]

[1] A reviewer in Chicago noted that the picture's theme had "plenty of applicability . . . in Chicago, where newspaper stories for months have been detailing the abuses and neglect of young people in corrective institutions." Chicago Sun-Times, September 13, 1974, at 62. "An associate of a girls' detention center in Boston felt that the movie would help instigate more desperately needed penal reform," noting that " 'actions such as the rape of the young girl do take place.' " N.Y. Times, September 29, 1974, at 21. Finally, one 16 year old writer to the *New York Times* observed that the film "was actually a constructive experience . . . . It might even create a fear of such places, that it might prevent children from resorting to belligerence or running away, and force them to face their troubles head-on, calmly and rationally.' " *Id.*

In October of 1974, respondent, through her guardian, filed a complaint in the Superior Court of California. It alleged that a few days after the broadcast of "Born Innocent," she was sexually molested by other adolescents (Pet. App. 21a). Respondent contended that her principal assailant was mentally disturbed and obtained the idea for the assault from a rape scene in the picture.

While the complaint alleged that respondent's assailants obtained the idea for their assault from "Born Innocent," it nowhere alleged that the picture incited or urged the commission of an assault. Proposing essentially a tort theory of imitation, the complaint merely alleged that petitioners "knew or should have known . . . that broadcasting such a scene could cause some minors to imitate such conduct" (Pet. App. 21a) and that petitioners "knew this scene might cause minors to imitate this act" (*Id.* at 23a). Claiming that petitioners acted negligently and maliciously, respondent sought general damages of $1,000,000 and punitive damages of $10,000,000.

After viewing the film and accepting as true both the allegations of respondent's complaint and respondent's offer of proof, the California Superior Court found as a matter of both fact and law that the "motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action" (Superior Court Findings of Fact and Conclusions of Law, Pet. App. 11a, 16a). It therefore ruled that respondent's action was barred by the First Amendment and dismissed the suit.

Respondent appealed to the Court of Appeal of the State of California, which reversed the trial court, holding that there were triable issues of fact which required resolution by a jury.

Petitioners sought a hearing in the California Supreme Court. Their petition was denied on January 19, 1978, three justices voting to grant the petition (Pet. App. 9a).

Prior to filing their petition for writ of certiorari in this Court, petitioners sought a stay of the trial below. Mr. Justice Rehnquist denied a stay on the ground that petitioners would not suffer irreparable injury by being required to defend the action below, even if the Court granted certiorari. In so doing, Mr. Justice Rehnquist stated that he was "quite prepared to assume that the Court would find the decision of the Court of Appeal . . . a 'final judgment' for purposes of 28 U.S.C. § 1257(3) pursuant to its holding in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)."[2] The petition for a writ of certiorari was filed on March 17, 1978.[3]

ARGUMENT

I. The Decision of the Court Below Is Contrary to a Long and Firmly Established Series of Decisions of This Court.

It is clear that the material broadcast here should be and is protected by the First Amendment.[4] It is also clear that First Amendment rights may be violated by permitting civil tort actions, just as they may be violated

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[2] *National Broadcasting Co.* v. *Niemi*, 46 U.S.L.W. 3523 (U.S. Feb. 21, 1978).

[3] 46 U.S.L.W. 3602 (U.S. March 28, 1978).

[4] As this Court observed in *Winters* v. *New York*, 333 U.S. 507, 510 (1948):

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

See also Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) (protection for theater productions); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (protection for television broadcasting); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (protection for motion pictures).

by criminal prosecutions. What this Court held with respect to libel in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964), applies with equal force to the proposed tort of imitation:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (Footnotes omitted.)

Accordingly, if broadcasters are to be held accountable in tort for injuries connected in some way with the material they broadcast, it must be done according to a "standard [which] administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). This requirement, set forth most clearly in the libel cases, where harm to another individual and the identity of that individual may usually be appreciated at the time of the publication, applies with even greater force with respect to the tort of imitation, where the broadcaster is induced to avoid the mere possibility that some unknown individual with unique personality disorders will commit a tort in imitation of something observed on television.[5]

We need not look far to discover the standard which should apply in this case. In a long and established line of cases, the Court has enunciated a standard governing speech that threatens injury to other individuals. As far

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[5] Justifying respondent's tort theory on this basis seems "plainly untenable[, for a]t most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'" *Cohen* v. *California*, 403 U.S. 15, 23 (1971), quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969).

back as 1914, in *Fox* v. *Washington*, 236 U.S. 273 (1915), Justice Holmes, writing for the Court, recognized the distinction between permitting liability to attach for the expression of an idea and permitting liability to attach for advocating the execution of that idea. In *Fox*, the Court held that liability could be imposed constitutionally only for the latter.

This historical constitutional distinction was perhaps best articulated by Justice Frankfurter in his concurring opinion in *Dennis* v. *United States*, 341 U.S. 494, 545 (1951):

> "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

As Justice Frankfurter further noted, "there is underlying validity in the distinction between advocacy and the interchange of ideas." *Id.* at 546. In *Yates* v. *United States*, 354 U.S. 298, 322 (1957), this Court adopted Justice Frankfurter's articulation and held that only advocacy may be prohibited and, even then, only when there is an immediate threat that the advocacy will lead to unlawful behavior. As this Court held in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[6] The state may

[6] Beginning with *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), this Court observed in an opinion written by Justice Holmes:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

[Footnote Continued on Page 7]

not even penalize the "advocacy of illegal action at some indefinite future time." *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

The Court's decisions in this area also make it clear that even where there is significant risk that speech will result in unlawful acts, it may not be suppressed unless it rises to the level of unlawful advocacy. In *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), for example, the Court reversed the petitioner's conviction for breach of the peace in circumstances where an angry and turbulent crowd threatened violent responses to petitioner's public address denigrating various political and racial groups. Similarly, in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the Court reversed appellant's conviction for disturbing the peace where appellant had led a civil rights demonstration in circumstances where the expressed discontent of white onlookers created a risk of violence.

It is clear beyond question that the program involved here did not advocate unlawful action or sexual assault; indeed, it condemned it. Liability here is pinned merely to the communication of an idea, for the broadcasters' allegedly "negligent" and "malicious" acts in this case con-

[6] [Continued]
Sometime later, in *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965), this Court drew the distinction between unlawful advocacy and protected speech by holding that demonstrators peaceably expressing their views could not be convicted for "breach of the peace" where that term had been defined as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." Finally, in *Street* v. *New York*, 394 U.S. 576 (1969), the Court held that a conviction for publicly burning and casting aspersions upon the American flag could not be constitutionally justified by an interest in preventing the incitement of unlawful acts. The defendant's "excited public advocacy of [an] idea" could not be penalized where he "did not urge anyone to do anything unlawful." *Id.* at 591. *See also Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Yates* v. *United States*, 354 U.S. 298 (1957); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

sisted solely of broadcasting a motion picture with the knowledge that one of the scenes might be seen by someone who might imitate the assault portrayed in it. Allowing the state to impose liability under such circumstances would clearly inhibit, if not come close to entirely suppressing, the mere interchange of a wide variety of ideas of social, political, artistic, scientific and aesthetic importance.

Under the tort theory advanced by respondent, broadcasters would operate under the fear that their broadcasts would result in massive damage actions by individuals alleging they were injured by third parties committing acts identical or merely "similar" in significant respects to acts portrayed on television. In permitting the penalization of the broadcast here and expressions like it, the theory would "saddle [broadcasters] with the impossible burden of verifying to a certainty" that no harm would come to others as a result of material broadcast by them. *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). "Fear of large verdicts in damage suits . . ., even fear of the expense involved in their defense, must inevitably cause [broadcasters] to 'steer . . . wider of the unlawful zone.'" *Id.*

The inhibition on free speech which would be created by the proposed tort of imitation is substantially increased by the imprecise and virtually unascertainable standard of conduct which it would require broadcasters to follow. In *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), the Court reversed a conviction for the common-law crime of criminal libel. The nonstatutory crime had been defined by the state court as "'any writing calculated to create disturbances of the peace.'" *Id.* at 198. With First Amendment rights primarily in mind, the Court held that the definition of the crime impermissibly "leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a

particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.'" *Id.* at 200.

Respondent's proposed tort of imitation suffers from the same defects which were fatal to the common-law crime of criminal libel in *Ashton*. It requires broadcasters to determine the response of millions of viewers and listeners to programs broadcast by them, plainly an impossible task. Moreover, it requires broadcasters to make such judgments not just about the normal individual, about whose behavior we all have some understanding, but also about the aberrant individual whose behavior, even for specially trained persons, may be extremely difficult to predict.[7]

II. The Decision of the Court Below Presents an Important Question Under the First Amendment Which Should Be Promptly Resolved by this Court.

The First Amendment issue presented here was clearly decided by the court below.[8] Moreover, as Mr. Justice

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[7] In construing the Smith Act consistently with First Amendment requirements, this Court held that convictions under that Act for advocating unlawful action were invalid where instructions to the jury had omitted the requirement that the illegal language be "*reasonably and ordinarily calculated to incite persons.*" *See Yates* v. *United States, supra*, 354 U.S. at 315-16, 326 (emphasis in original). Similarly, the Court has required that convictions for the use of "fighting words" be based on language that is "inherently inflammatory," *Street* v. *New York*, 394 U.S. 576, 592 (1969), and "likely to provoke the average person to retaliation." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942). Finally, in *Cohen* v. *California*, 403 U.S. 15, 23 (1971), the Court observed that "[t]here may be some persons about with . . . lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression."

[8] Although the Court of Appeal's express holding was that respondent was denied a right to a jury trial under the state consti-

Rehnquist indicated in denying a stay of these proceedings below, the decision of the California Court of Appeal is final for purposes of 28 U.S.C. § 1257(3). This case presents precisely the same situation as in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In *Cox*, as here, the state courts had rejected the broadcaster's First Amendment challenge to a tort action. There, as here, the case remained to be tried in the state trial court when it was brought to this Court. And in both cases, the outcome of the trial might have obviated any need to consider the First Amendment issue.

The Court in *Cox* nevertheless held that the decision of the state courts was final and reviewable. In so holding, the Court emphasized that review in this Court would likely dispose of the entire action. Failing review, an important First Amendment issue would remain unresolved, forcing broadcasters in the future to act at their peril.

The same is true here. If review is denied by this Court, it will be several years before this case, or a similar case encouraged by the decision below, works its way again to this Court. It is apparent that similar tort actions alleging imitation will be brought during this time.[9] Failure to review this case at this juncture, there-

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tution, that holding unavoidably imported a decision on the First Amendment issue. The Court of Appeal necessarily, albeit implicitly, decided that the First Amendment did not bar a tort action based on a theory of imitation. The First Amendment question, therefore, is properly presented here. *See Radio Station WOW* v. *Johnson*, 326 U.S. 120, 127-29 (1945); *Neilson* v. *Lagow*, 53 U.S. 98, 109 (1851). We note that respondent's reply brief does not argue or even suggest that the First Amendment question is not properly before this Court.

[9] Indeed, respondent's suit is the first of two actions that have already been brought against petitioner NBC under essentially the same theory. *See Kane* v. *National Broadcasting Co.*, No. 77 Civ.

fore, will perpetuate the inhibitory effects of the decision below.

Those inhibitory effects are substantial. It requires little discussion to appreciate the broad reach of the tort theory advanced. The theory is not limited to liability for ideas contained in certain types of television programs. Injuries inflicted by third persons in pursuit of ideas gleaned from all types of programming, including a news report of a crime or a documentary on aircraft hijacking, detective shows, westerns, serious dramatic programs such as "I, Claudius" or "The Autobiography of Miss Jane Pittman," or even comedy programs, could become the subject of civil actions against broadcasters under respondent's theory. Moreover, given the variety of possible aberrational behavior, virtually any program or scene on television, violent or otherwise, could provide the idea for the commission of an injurious act. Thus the broadcaster would be required to broadcast all programming at a substantial risk. Moreover, the imitation theory is not limited in application to the broadcast media. A disturbed person may react to any form of communication in a harmful manner.

As this Court observed in the *New York Times* case, civil tort actions, by their nature, contain great potential for suppressing free speech—perhaps even more than criminal restraints. Damage awards may far exceed criminal fines. Criminal law safeguards such as the requirement of an indictment and proof beyond a reasonable doubt are absent in tort actions. And liability for injury need be established merely by a preponderance of the evidence. Thus the incipient tort of imitation threat-

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1193 (JMC) (S.D.N.Y. filed March 11, 1977). In addition, the Florida murder trial of Ronald Zamora, who claimed he killed because of insanity brought on by constant television watching, has achieved notoriety, and a recent newspaper article reports an instance where the idea for a murder was allegedly inspired by the television series "Kojak." N.Y. Post, March 30, 1978, at 17.

ens " 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' " *Id.* at 278, quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

Under respondent's tort theory, broadcasters and other publishers will be required to act at the great peril of being required to pay, or at least defend against paying, staggering sums of money for injuries caused by persons, no matter how depraved, who allegedly obtained the idea for their malevolent acts from some communication made available to the general public. This would be true even though there was no intent to bring about injury. Under these circumstances, self-censorship would be substantially encouraged; the exercise of First Amendment rights of broadcasters, publishers and authors to communicate news and ideas to the general public would be markedly inhibited. At least as much as the libel actions involved in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278 (1964), "the pall of fear and timidity imposed" by the tort of imitation would create "an atmosphere in which the First Amendment freedoms cannot survive."

The *in terrorem* effects of respondent's tort theory would in many instances restrain the presentation of material, including news reports, that serves to focus community attention on abuses and deficiencies in our society. Such material often plays an important role in the political process by fostering public debate on social problems. The Founding Fathers fully recognized that some degree of risk was involved in allowing that freedom of expression essential to the functioning of a democratic society. Yet those risks were willingly assumed "in order to preserve higher values." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 125 (1973).

As the Court noted in another recent case holding a judgment of a state court to be final because of First Amendment considerations:

> "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the law] could only further harm the operation of a free press." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).[10]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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[10] *See also Mills* v. *Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring).